

STATE OF MONTANA,
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 22-2000:

MONTANA DISTRICT COUNCIL)	Case No. 1957-2000
OF LABORERS, Local No. 1334-2,)	
LABORERS INTERNATIONAL)	
UNION OF NORTH AMERICA,)	
)	
Complainant,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND RECOMMENDED ORDER
CITY/COUNTY OF BUTTE-SILVER BOW,)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

Michael T. Furlong conducted a hearing in this matter on September 12, 2000, at the Council of Commissioner's Chambers at the Butte-Silver Bow County Courthouse in Butte, Montana. The hearing was conducted under the authority of §39-31-406, MCA, and in accordance with the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA. Karl Englund, Attorney at Law, Missoula, Montana, represented the complainant. Tony Bonney and Jerry Ball appeared as complainant witnesses. Donald C. Robinson, Attorney at Law, Butte, Montana, represented the defendant. David Schultz, Chuck Brozovich, Jim Conlin, and Dan Hancock appeared as defendant witnesses.

Complainant Exhibits A, F, G, H, and J were admitted into the record without objection. Defendant Exhibits 2, 5, 8, 9, 10, 11, 14, 16, 17, and 18 were admitted without objection. Defendant Exhibit 15 was excluded as a duplicate of

Complainant's A. Defendant Exhibits 1, 3, 7, and 13 were admitted over Complainant counsel's relevancy objections, and Defendant's Exhibit 6 was admitted over counsel's hearsay objection.

At the conclusion of the hearing, the Hearing Officer allowed the parties to file post-hearing briefs to be filed by mail by October 13, 2000. The parties timely filed post-hearing briefs.

II. ISSUE

Whether the City/County of Butte-Silver Bow committed an unfair labor practice violation of §39-31-401, MCA. Specifically, the union alleges that the transfer of Tony Bonney, an employee of the Butte-Silver Bow Public Works Department, Water Utility Division, was motivated by or in retaliation for Bonney's union activities.

III. FINDINGS OF FACT

1. The Butte-Silver Bow government purchased the assets of the Butte Water Company in 1992. At that time, the Water Utility Division was established, which was responsible for the operation of the municipal water system within the Public Works Department. There are from 12 to 13 laborer positions assigned to the Water Utility Division. Complainant, Montana District Council of Laborers, Local No. 1334-2, Laborers International Union of North America, is the exclusive bargaining representative for the individuals employed in the laborer positions. A collective bargaining agreement has been in place since 1992 between the union and Butte-Silver Bow. The provisions of the agreement have remained essentially unchanged in that time.

2. Butte-Silver Bow has a written Class Specification (job description) for the position of laborer assigned to the Public Works Department. (Exhibit 17). There are no sub-classifications of laborers. All laborer positions in the department have the same base hourly wage.

3. Under the labor agreement's "rights of management" clause, management has the authority to make job assignments that lead to the efficiency and effectiveness of the Water Utility Division. There is no bidding process or seniority clause in place for workers to transfer or seek other positions within the unit under the work contract.

The labor agreement provides as follows:

Article 26--Rights of Management.

Section 1: The Union shall recognize the prerogatives of the Employer, subject to the terms of this Agreement, to operate and manage the affairs of the Butte-Silver Bow Government in such areas as, but not limited to:

- a. Direct employees;
- b. hire, promote, transfer, assign and retain employees; . . .
- e. determine the methods, means, job classification and personnel by which government operations are to be conducted;

(Exhibit 18, p. 15)

4. Management has historically exercised its right to transfer employees without considering the seniority or preference of the employee. Whenever a dispute arose over job assignments, seniority or preference were not governing factors.

5. Management assigns Water Utility Division laborers to a variety of jobs, including construction, maintenance and repair of public water lines and facilities, monitoring of valves and customers' water usage, and turning water on and off at customers' curb-clock junctions with the city lines. Historically, the Water Utility Division has experienced little employee turnover. Reassignments of work for the

laborers occur primarily when vacancies are created by retirement. On a number of occasions, laborer job assignments have been reshuffled when retirements occurred.

6. Tony Bonney started working for the Butte Water Company in December, 1988. When Butte-Silver Bow purchased the Butte Water Company in 1992, Bonney transferred his employment as a laborer to Butte-Silver Bow as a Public Works Department employee. He has continued working in that capacity since that time. He is directly subordinate to Dave Schultz, assistant Public Works Department director and director of the Water Utility Division.

7. During the course of his employment, Bonney has held various laborer job assignments within the water department. Prior to 1997, he was a general construction laborer working the day shift from 8:00 a.m. to 4:00 p.m.

8. Bonney has been a union steward for a number of years. He held the job steward position with the union when he was originally assigned to the afternoon shift laborer position in 1997. In that capacity, he frequently participated in union-management related matters, including grievances filed by union employees.

9. In 1997, Butte-Silver Bow reassigned Bonney to the afternoon shift laborer position. In that assignment, he worked a revolving schedule that included weekends for every other two month period (Complainant's Exhibit 16). He worked Monday through Friday, 4:00 p.m. to 12:00 a.m. for a two month period. During the next two months, he worked Wednesday through Friday 4:00 p.m. to 12:00 a.m., and Saturday and Sunday, 8:00 a.m. to 4:00 p.m.

10. When Bonney worked the afternoon shift position, Butte-Silver Bow paid him his base hourly wage plus \$9.45 premium per shift. When he worked Saturdays, Butte-Silver Bow paid him his regular hourly wage, \$5.85 premium per shift, and two hours on call pay at double his regular hourly wage. When he worked

on Sundays, Butte-Silver Bow paid him his regular hourly wage, \$7.85 premium per shift, and two hours on call pay at double his regular hourly wage. The wage differentials were paid as set forth in the bargaining agreement.

11. Bonney's duties as afternoon shift laborer included responding to calls for assistance, calling out crews to respond to calls that he could not handle alone and that could not wait until a normal workday, responding to customer inquiries, taking water samples to insure water purity, and cleaning the water department work area.

12. In the early fall of 1999, four employees within the laborer group at the Water Utility Division announced their retirements. Schultz planned to fill three of the four positions by reassigning other laborers within the bargaining unit. One of the employees who retired effective September 30, 1999, was the individual who held the "shut-off man" position. The shut-off man worked normal business hours Monday through Friday, from 8:00 a.m. to 4:30 p.m.

13. In searching the Water Utility Division labor pool for a replacement for the shut-off man, Schultz found that Bonney possessed the required combination of experience and skills, including working alone, unsupervised, and using independent judgment in dealing with day-to-day situations. Bonney's prior experience as an afternoon shift laborer was similar in terms of duties and responsibilities to those of the shut-off man. Both positions involve travel around the city in a pickup truck. Both require familiarity with the location of water lines, valves, and related facilities. Both involve dealing directly with customers. Schultz found Bonney to be adept in dealing with the public and handling customers who might be upset with the Water Utility Division for shutting off the customer's service. Management had complimented Bonney for his ability to deal with customers during the course of his employment.

14. The individual assigned to the afternoon shift must respond to on-call emergencies and call out crews as needed. In addition, the afternoon shift must be certified to test water samples, a duty not required of the shut-off man.

15. Upon concluding his search for a new shut-off man, Shultz determined that Bonney was the best and most logical choice for the position vacancy. On September 13, 1999, Schultz told Bonney that he would be reassigned as shut-off man effective October 1, 1999.

16. Immediately upon being told of the transfer, Bonney informed Schultz that he objected to the reassignment and planned to file a grievance. Schultz responded that he was "not surprised because you grieve everything anyway."

17. On September 14, 1999, Bonney sent a letter to Schultz stating that he was not interested in the new position because he believed it would be a demotion with less work responsibility and a reduction of income as the result of the loss of the shift differential pay he received on the afternoon shift. He asked for a meeting with Schultz to discuss his concerns.

18. On September 14, 1999, Bonney and the union business agent went to Schultz's office to discuss the reassignment without an appointment. Schultz informed them that he could not meet at that time because of other scheduled commitments. While engaging in a brief conversation just outside of his office, Schultz commented to the union agent that it "didn't surprise me to see you here today" because "Tony grieves everything down there anyway."

19. In the past, Water Utility Division employees have regarded the shut-off man as a desirable job and for that reason have applied for and readily accepted assignments to that position.

20. Chris Shea was the member of the Water Utility Division with the longest term of employment among the laborers in the unit. He had also occasionally

filled in for the position. When he learned that the shut-off man would become vacant in October 1999, he informed Schultz that if no one else was interested in the job, he would like to be considered. (Exhibit 6). Schultz indicated to Shea at the time that no decision had been made regarding the selection.

21. On October 4, 1999, Bonney initiated a grievance through the union resulting from the reassignment to the shut-off man position.

22. On September 29, 1999, the union representative wrote to Schultz requesting a written list of the "reasons why Bonney was considered the best qualified for the 'shut-off' job and a written job description for the 'shut-off' and 'afternoon laborer' positions." In response, Schultz sent the position description for the position of general laborer within the Water Utility Division, identical for each of the positions. The county did not include the list of reasons why Bonney was selected for shut-off man.

25. In his capacity as assistant Public Works Director, Schultz has frequently been involved in management/union-related matters, including collective bargaining issues. Jim Collin, union steward for the IBEW, and Dan Hancock, union steward for the operating engineers for county employees, have had a number of interactions with Schultz while representing union employees concerning work-related issues. Schultz has never allowed disagreements over union matters to influence his supervision or treatment of union workers or his dealings with them.

IV. DISCUSSION/RATIONALE

The complainant alleges that the transfer of Bonney to shut-off man, a day shift position, violated §39-31-401, MCA, because it was motivated by or in retaliation for Bonney's union activities. Bonney contends that his transfer from afternoon shift laborer to shut-off man was a demotion in terms of lost income and

responsibilities. Further, Bonney alleges that management's decision to transfer him was not for substantial business reasons because the respondent did not prove that he was the most qualified for the assignment. Bonney also questions management's motives for not selecting Chris Shea as shut-off man, since Shea had seniority, past experience in the position and had expressed an interest in the assignment. Bonney alleges that the remarks made by Schultz concerning involvement in prior grievances show that management's real motivation for Bonney's transfer was based on his union activities.

Section 39-31-401(3), MCA, makes it an unfair labor practice for a public employer to "discriminate in regard to . . . any term or condition of employment in order to encourage or discourage membership in any labor organization" An involuntary reassignment of an employee based on animus toward his union activity would violate this section. Further, it is an unfair labor practice for an employer to "interfere, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201." §39-31-401(1), MCA. The filing and processing of grievances in one's capacity as a shop steward is concerted activity protected by §39-31-201, MCA, and any retaliation based on the employee's union activity is therefore a violation of §39-31-401(1), MCA.

In Board of Trustees v. State ex. rel Board of Personnel Appeals, 185 Mont. 89, 604 P.2d 770 (1979), the Montana Supreme Court articulated the following test to determine when a violation of this section has occurred:

When a charge is made of anti-union discrimination, substantial evidence must be adduced to support at least three points. First, it must be shown that the employer knew that the employee was engaging in some activity protected by the Act. Second, it must be shown that the employee was discharged (or suffered some other detriment) because he had engaged in a protected activity.

(Cites omitted.) The first and second points constitute discrimination and the practically automatic inference as to the third point results in a violation of Section 8(a)(3).

189 Mont. at 98, 604 P.2d at 775 quoting NLRB v. Whittin Machine Works, 204 F.2d 883, 884 (1st Cir. 1953).

In the instant case, there is no doubt as to the facts establishing the first criterion – knowledge on the part of Butte-Silver Bow that Bonney was an active union steward. Undisputed testimony reveals that Bonney was a steward, he was active, he participated in negotiations, he processed grievances, and when he did so, he worked directly with management, including Schultz. As the Montana Supreme Court held, the third criteria is established as a "practically automatic inference" if there is evidence to support a conclusion of employer knowledge of union activity and anti-union motivation for the employer's actions.

That leaves the most difficult of the three criteria – the issue of the employer's motivation. "The task of determining motivation is not easy, and agencies and courts must rely on the outward manifestations of the employer's subjective intent." Billings School District, 185 Mont. at 99, 604 P.2d at 776.

The evidence in this case does not support a finding that the employer took an adverse action regarding Bonney. Prior to the reassignment announcement on September 13, 1999, there is no evidence that management had reason to believe that Bonney would protest the transfer to shut-off man. Bonney had never indicated prior to September 13, 1999, that he would object to a potential transfer to shut-off man if it occurred. The evidence does not reveal that management was lead to believe that members of the Water Utility Division labor pool, including Bonney, considered shut-off man a demotion or reduction in duties from other positions. In fact, management had found in the past that the shut-off man had often been

preferred as a desirable assignment. Both the shut-off man and afternoon shift position are classified as laborer positions and are not distinguishable under the labor agreement. The hourly base pay for both positions was the same, which indicates no significant difference between the positions regarding the degree of difficulty in the work. Both positions had a number of similar duties and responsibilities. Further, Bonney acknowledged that he has all the necessary skills, experience, and qualifications for the job. He also admitted his understanding of management's exclusive right to reassign employees classified as laborers within the Water Utility Division under the terms of the collective bargaining contract. In addition, the record is absent evidence that Shultz or other members of management had displayed a demeanor towards Bonney that threatened his union membership or activities.

Bonney argues that the transfer to shut-off man in effect resulted in a job demotion with a reduction in duties and a significant loss of income due to the loss of premium pay and overtime. The labor contract provides that the afternoon shift has a premium of \$.45 per hour attached to it, and the so-called "graveyard" shift has a premium of \$.50 per hour. (Exhibit 18, Article 11). While he may have preferred the afternoon shift, with its additional overtime and differential compensation, He did not prove that management demoted or treated him adversely. Generally, under a bargaining agreement, differential shift pay and overtime are not associated with difficulty of tasks related to a position. Rather, they are compensation provided for less desirable working conditions or statutory overtime pay rate for working in excess of 40 hours per week. While the afternoon shift required certification for test sampling, by itself, certification is not determinative in establishing job complexity. The bargaining agreement provides for differential compensation for the afternoon shift position without mentioning the complexity level of duties. Therefore, Bonney

failed to prove that his transfer to shut-off man was a demotion or reduction in level of assigned duties.

Even if management's reassignment of Bonney could be considered an adverse action, the complainant did not prove unlawful motivation or union animus regarding management's decision to transfer him. Bonney believed Schultz's remark about his lack of surprise that Bonney intended to file a grievance because he had previously filed numerous grievances, was a reference to his position as job steward. Considering the evidence as a whole in the context of this case, this remark is insufficient to raise even an inference of unlawful motivation or union animus. At best, it establishes that management knew of Bonney's union activity, a fact not seriously disputed in this case. As noted, Schultz's remark was made only after Schultz had already made his decision to transfer Bonney. While the remark may have been inappropriate, it is by itself insufficient to satisfy the burden of proof requisite in this case. It was not made in the context of explaining the intent of the employment action. There is no evidence to suggest that Shultz has a history of anti-union activities or anti-union animus. To the contrary, the record shows that his conduct toward union representatives and union activities was business-like, professional and straight forward. There is no reliable inference that Shultz's comment was discriminatory.

The comment is more akin to a stray remark, which is insufficient to establish discriminatory intent. Price Waterhouse v. Hopkins 490 U.S. 228, 277 (1989) (Concurring opinion of Justice O'Connor); Laudert v. Richland County Sheriff's Department, ___ Mont. ___, 7 P.3rd 386, 2000 MT 218 (2000).

Because the complainant failed to prove any unlawful motivation, it is unnecessary to consider whether the reassignment was unlawful in light of the employer's legitimate reasons for selecting Bonney for transfer. The mixed motive

and pretext analyses of labor cases such as Wright Line, 251 NLRB 1083 (1980), enforced 662 F.2d 889 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1989) and similar cases apply only when the complainant has proved the existence of unlawful motivation, but the employer has proved the decision was also motivated by other, lawful, considerations. In this case, the complainant simply failed to establish unlawful motivation.

V. CONCLUSIONS OF LAW

City/County of Butte-Silver Bow did not violate §39-31-401, MCA when it reassigned Tony Bonney to the shut-off man position.

VI. RECOMMENDED ORDER

It is hereby ordered that the Unfair Labor Practice Charge 22-2000 be DISMISSED.

DATED this 23rd day of February, 2001.

BOARD OF PERSONNEL APPEALS

By: Michael T. Furlong
Michael T. Furlong,
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to ARM 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals.

§ 39-31-406(6), MCA. Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

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DATED this 23rd day of February, 2001.

Carole A. Larkin